

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य के समक्ष
BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.1816 & 1817/Chny/2018
निर्धारण वर्ष /Assessment Years: 2014-15 & 2015-16

Shri Amit Jain,
Prop. M/s. Amit S. Fragrances,
37, NMS Compound,
Erode – 638 001.
[PAN: AFIPJ 5671F]
(अपीलार्थी/Appellant)

Vs. The Asst. Commissioner of
Income Tax,
Circle-1,
Erode.
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri L.Shibi, C.S
प्रत्यर्थी की ओर से /Respondent by : Shri A.R.V. Sreenivasan, JCIT
सुनवाई की तारीख/Date of Hearing : 10.07.2019
घोषणा की तारीख /Date of Pronouncement : 13.09.2019

आदेश / O R D E R

PER SHRI S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed these two appeals against the common order of the Commissioner of Income Tax (Appeals)-3, Coimbatore, in ITA No.444/16-17 & 90/17-18 dated 01.03.2018 for the assessment years (AYs) 2014-15 & 2015-16, respectively. Since, common issues are involved in these appeals, they are heard together and being disposed together, for convenience sake.

2. Shri Amit Jain, the assessee, an individual, is proprietor of M/s. Amit S Fragrances, which is manufacturing and trading in fragrance supari, trades in textile handloom goods. Apart from receiving salary, the assessee admitted income from letting out of property, business (intraday) trading in shares, commission and interest income. During the assessment years 2014-15 & 2015-16, the assessee admitted short term capital gain and short term capital loss from sale of listed shares and also admitted short term capital gain from sale of shares u/s. 111A of the Income Tax Act, 1961 (in short 'the Act'). While making the assessments for AYs 2014-15 & 2015-16, the Assessing Officer (A O) found that the assessee purchased equity shares and sold them within a few days of the purchases, none of the shares were held for more than three months from the date of purchase. Most of the shares have not even been credited to D-mat account of the assessee. The assessee has transacted almost in 22/23 different scripts, respectively, the nature of the assessee's activity is that of trading in shares and not as an investment. Therefore, he proposed to assess the income arising from the sale of shares under the head 'business' and after giving due opportunity and considering the reply, the AO held that the frequency of buying and selling of shares and the period of holding shares could be criteria to classify whether the activities are of business or of an investment. Since in the assessee's case, none of the shares were held

for more than three months and most of the shares were sold within three months from the date of purchase, he assessed the income under the head 'business' and completed the assessments.

3. Aggrieved against those orders, the assessee filed appeals before CIT(A) and the Id. CIT(A) dismissed the appeals. Aggrieved against that order, the assessee filed these appeals with identical grounds and hence the grounds in ITA No.1816/Chny/2018 for AY 2014-15 is extracted as under:

"1. The Appellant challenges the order of the Commissioner of Income Tax (Appeals) on the following grounds amongst others each without prejudice to the other or others.

2. The order of the Commissioner of Income Tax (Appeals) is biased, arbitrary, and contrary to law, considering the facts and circumstances of the case.

3. The Commissioner of Income Tax (Appeals) has failed to appreciate the fact that the business of Appellant was manufacturing and trading in fragrance supari and also trades in textile handloom goods and the Appellant had invested its surplus capital fund in the shares as an investment and not as a business activity.

4. The Commissioner of Income Tax (Appeals) has failed to appreciate that the Appellant had been showing the investments in shares as 'Investments' in its books of account and not as 'Stock-in-trade'.

5. The Respondent had failed to note that Appellant had earned a dividend income of Rs.4,31,405/- during the relevant previous year and the Appellant had not carried on the transactions in shares as full time activity.

6. The Commissioner of Income Tax (Appeals) has erred in holding that income arising from sale of shares is assessable as business income mainly based on period of holding without considering the intention of the Appellant at the time of purchase and sale of the shares.

7. The Appellant craves leave to file additional ground at the time of hearing.”

4. The Id. AR submitted that the Id.CIT (Appeals) has failed to appreciate that the assessee had been showing the investments in shares as ‘Investments’ in its books of account and not as ‘Stock-in-trade’ and the AO has accepted the treatment of profit from sale of shares as LTCG . He invited our attention to the table indicating the assessee’s activities, *vis-à-vis* the head of income under which the assessee admitted the income, which is extracted as under:

AY 2014-15						
S. No.	Particulars	Intraday Trading	Short Term	Long term	Business	Exempt income
1.	Turnover	10,64,43,158.00	10,64,63,901.24	--	2,77,03,000.00	
2.	Profit	3,15,809.00	16,28,072.80	--	1,67,629.25	4,31,405.00
3.	Classification by Assessee	Business income	Capital gains	Capital gains	Business income	Exempt income
4.	Classification by AO	Business income	Business income	Capital gains	Business income	Exempt income

AY 2015-16						
S.No.	Particulars	Intraday Trading	Short Term	Long term	Business	Exempt income
1.	Turnover	13,16,24,156.00	8,01,24,374.29	23,20,998.00	1,28,12,448.00	
2.	Profit	6,35,444.00	48,61,982.00	1,22,146.31	4,23,853.27	2,58,795.00
3.	Classification by Assessee	Business income	Capital gains	Capital gains	Business income	Exempt income
4.	Classification by AO	Business income	Business income	Capital gains	Business income	Exempt income

Relying on the decision of the Hon’ble High Court of Delhi in the case of *CIT v. Om Prakash Arora in ITA 539/2012 dt 01.4.2014*, the AR

submitted that the various factors approved therein are taken into consideration and applied in this case, the assessee's treatment would pass through and hence pleaded to allow these appeals.

5. Per contra, the Id. DR relying on the decision of Hon'ble Jurisdictional High Court in the case of CIT v. NSS Investments P. Ltd. [2005] 277 ITR 149 (Mad.) which was also considered by the Delhi High court in the case relied on by the Id AR, supra, submitted that it is clear that on a turnover of 10.64 Cr & Rs 8.01 Cr., for the assessments for AYs 2014-15 & 2015-16 respectively, the assessee made a profit of Rs 16.28 lakhs & 48.61 lakhs, respectively, for the assessments for AYs 2014-15 & 2015-16, and claimed them as short term capital gains. The AO after due examination treated the income under the head 'business'. Aggrieved against those orders, the assessee relied on the CBDT Circle No.6/2016 dated 29.02.2016 etc before the Id. CIT(A). The Id.CIT(A) after duly considering the Board's Circular and the assessee's activity found that the assessee is already doing business in intraday trading in shares. It has also opted to treat part of the income from sale of shares as capital gain and however held such shares for less than 12 months, therefore, he held that the Board's Circular is not applicable to the assessee's case. Thereafter, the Id. CIT (A) considered the facts of the case and found that since the assessee has been regularly dealing in purchase of sale of

shares, the period of holding is very short and in some cases involved in speculative trade, the assessee earned only a meager amount of dividend and therefore, the Id. CIT(A) held that the income arising from sale of shares is assessable as business income only. However, he has also directed the AO to value the inventory of earning stock and closing stock and also isolate the transactions having the nature of speculative business and treat it separately. The Id. D R submitted that the decision of Id. CIT(A) is in accordance with criteria laid down by the Hon'ble High Court of Delhi, which was relied on by the Id AR, supra, and hence pleaded that the assessee's appeals may be dismissed.

6. We heard the rival submissions and gone through the relevant material on record. For the AYs 2014-15 & 2015-16, apart from various heads, the assessee has admitted income from sale on shares (INTRADAY) under the head business and income from profit on sale of shares under the head capital gains also. On examination, the AO found that during the assessment year 2014-15, the assessee admitted income from sale of shares (Intraday) under the head business at Rs.3,15,809/-. In addition to it, out of profit of sale on shares of Rs.20,21,695/-, the assessee adjusted short term capital loss of Rs.3,93,622/- and admitted Rs.16,28,073/- as income from capital gains u/s.111A of the Act. For the assessment year 2015-16 also, the

assessee admitted income from sale of shares (Intraday) under the head business at Rs 6,35,444/. In addition to it, the assessee admitted Rs. 48,61,982/- as income from capital gains u/s. 111A of the Act. After examining the purchases and sales claimed under the head capital gains, the AO found that the assessee has transacted almost in 22 / 23 different scripts, during the assessment years 2014-15 & 2015-16, respectively, and that the sales were made within few days of purchases. No share was held for more than three months from the date of purchase. Most of the shares have not been credited to D-mat account. Considering the frequency of buying and selling and the period of holding of shares, the AO held that the nature of the activity is that of trading in shares and not an investment in shares, therefore he held that the income arising from sale of shares, claimed by the assessee under the head capital gains, is assessable as business income and assessed accordingly. Now, in this regard, reliance is also placed on the decision of Hon'ble Delhi High Court in the case of Om Prakash Arora (supra), the relevant portion of which is extracted as under:

"7. The factors which Courts and Tribunals have to take into consideration whilst deciding whether income gained during a particular period is business income through purchase and sale of shares or other tradable capital assets, or capital gains on account of sale of such assets, has been spelt out and reiterated in a number of decisions. These include Raja Bahadur Visheshwar Singh v. CIT, (1961) 41 ITR 685 (SC); Commissioner of Income Tax, U.P v. Madan Gopal Radhey Lal, [1969] 73 ITR 652 (SC); Commissioner of Income Tax v Associated Industrial Development Company 82 ITR 586 (SC); P.M. Mohammed Meerakhan v. Commissioner of Income tax, Kerala, 73 ITR 735 (S.C.) and Commissioner of Income Tax v NSS

Investments Ltd 2007 (277) ITR 149 (Mad). It was in the light of these decisions that the CBDT Circular No. 4/2007, was issued, indicating the principles applicable in this regard. These criteria are:

- (1) Intention of the assessee at the time of purchase of the shares. This can be found out from the treatment given to the purchase in the assessee's books of account.*
 - (2) Did the assessee borrow money to purchase the shares, and paid interest for it. Money is generally borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.*
 - (3) Volume and frequency of the purchases and sale/disposals. If purchase and sales are frequent, or there are substantial transactions in an item, that can indicate trade. Habitual dealing in a particular item is indicative of intention of trade. Likewise, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment). Another related factor is the duration for which the shares are held.*
 - (4) Was the purchase and sale made for realizing profit, or for retention and appreciation in its value. The former indicates the purchases being part of trade; and the latter is indicative of the purchases being an investment. Furthermore, it would be relevant to ask whether the intention behind the purchase was to enjoy dividend, or merely to earn profit on sale of shares. Importantly, a commercial motive is an essential ingredient of trade in this context.*
 - (5) Whether the items in question were valued at cost. If so, it would indicate that they were investments. Where they were valued at cost or market value or net realizable value, whichever is less, it will indicate that items were treated as stock-in-trade.*
 - (6) Finally, it would be relevant to consider how the assessee is authorized in its Memorandum / Articles.*
- 8. It has also been held that if the business activity of the assessee is trading in shares, there can be a presumption that the amount claimed was derived through trade; the assessee in such cases has to establish that the amount was indeed invested and the proceeds of sales were of a capital asset. Furthermore, keeping a separate investment account would also be a relevant indicia."*

6.1 If we apply the above factors to the facts of this case, the reasoning given by the lower authorities to assess the income under the head business is, in our view, very well justified. Further, since in this case, the business activity of the assessee is trading in shares, there can

be a presumption that the amount claimed was derived through trade; in such case, the assessee has to establish that the impugned amount was indeed invested and the proceeds of sales were of a capital asset. However, the assessee has not laid any such material either before the lower authorities or before us. Therefore, on the above facts and circumstance and in the light of the above Delhi High Court's decision, we do not find any merit in the submissions of the assessee and hence dismiss the appeals.

7. In the result, both the appeals filed by the assessee are dismissed.

Order pronounced on the day of 13th September, 2019 in Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai, दिनांक/Dated: 13th September, 2019.

EDN, Sr. P.S

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant

2. प्रत्यर्थी/Respondent

3. आयकर आयुक्त (अपील)/CIT(A)

4. आयकर आयुक्त/CIT

5. विभागीय प्रतिनिधि/DR

6. गार्ड फाईल/GF

Sd/-

(एस. जयरामन)

(S. JAYARAMAN)

लेखा सदस्य/ACCOUNTANT MEMBER